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The United States' Prohibition on Foreign Direct Investment in Cuba—Enough Already?!?

J. Michael Taylor

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I. Introduction

Over the last four decades, the United States government has restricted its citizens from investing in Cuba. The policy of prohibiting investment in Cuba, when first implemented, served as a legitimate response to the expropriation of U.S. assets by the Cuban government during 1959 and 1960.¹ Through the passage of time, however, the

1. In response to the nationalization of assets owned by U.S. investors in Cuba during 1959 and 1960, an extensive embargo was placed by the United States on Cuba. This first embargo effort led to additional actions, now existing in statutory form. See MICHAEL W. GORDON, *THE CUBAN NATIONALIZATIONS: THE DEMISE OF FOREIGN PRIVATE PROPERTY* 104 (1976)

investment restrictions (as embodied today in the Helms-Burton Act²) have proven ineffective in their ultimate goals, and thus deserve rethinking.

Now is an especially appropriate time to consider the lifting of investment restrictions in Cuba. Felipe Pérez Roque, the Cuban Minister of Foreign Affairs, announced before the United Nations General Assembly in November 2001 that Cuba is willing to negotiate a "fair and honorable" compensation arrangement for those U.S. companies and citizens whose property was expropriated.³ Although such negotiations would necessarily require the United States to take into account the effects of its embargo and investment restrictions upon Cuba, the step toward open dialogue on the matter of reparations is a positive sign of potential movement in the diplomatic stalemate.⁴

After providing an initial overview of foreign direct investment, this paper discusses the history of investment relations between the United States and Cuba.⁵ The paper then

(citing N.Y. TIMES, Oct. 20, 1960, at 1, col.7). Gordon goes on to state:

This action, overshadowed in light of the nationalizations, was the important beginning of a United States led economic boycott of Cuba. Although thought by many United States government officials to be the prelude to an economic and ultimately political collapse of Castro, history has evidenced otherwise.

Id. at 104 n. 112.

2. Cuban Liberty and Democratic Solidarity (Libertad) Act, 22 U.S.C.A. §§ 6021–6091 (West Supp. 2002) [hereinafter Helms-Burton Act].
3. On November 27, 2001, H.E. Mr. Felipe Pérez Roque made a statement before the fifty-sixth session (64th plenary meeting) of the General Assembly of the United Nations to introduce Draft Resolution A/56/L.9 entitled, "Necessity of ending the economic, commercial and financial embargo imposed by the United States of America against Cuba." See JOURNAL OF THE UNITED NATIONS: PROGRAMME OF MEETINGS AND AGENDA SCHEDULED MEETINGS, U.N. General Assembly, 56th Sess., Agenda Item 34, U.N. Doc. 2001/231 (Nov. 28, 2001). The resolution was adopted after being passed by 167 votes to 3, with 3 abstentions. *Id.* The applicable excerpt of Mr. Roque's statement follows in endnote 4, *infra*.
4. While identifying several action items as being necessary preludes to the lifting of the embargo against Cuba, Mr. Roque stated it would be necessary for the United States:

To negotiate with Cuba a fair and honorable arrangement to provide compensation for the nearly 6,000 U.S. companies and citizens whose properties were nationalized in the first years of the Revolution, as part of a sovereign step essential for the country's socio-economic development. It was, in fact, the blockade that prevented the U.S. citizens from receiving the relevant compensation. Cuba recognizes their rights—and would be willing to reach an agreement that also takes into account the extremely burdensome economic, and human hardships inflicted on our country by the blockade.

See *Statement Delivered by H.E. Mr. Felipe Pérez Roque, Minister of Foreign Affairs of the Republic of Cuba, to Introduce the Draft Resolution on the "Necessity of Ending the Economic, Commercial and Financial Embargo Imposed by the United States of America against Cuba," Under Agenda Item 34 of the Fifty-Sixth Session of the United Nations General Assembly* (Nov. 27, 2001) http://www.iacenter.org/cuba_un1201.htm (last visited Dec. 21, 2001).

5. The scope of any discussion addressing relations between Cuba and the United States could encompass many topics. Recognizing this, this paper specifically limits its analysis to the role that foreign direct investment has played (and continues to play) in the sovereign relationship between the countries at issue.
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analyzes the current status of restrictions placed by the United States upon direct investment in Cuba, determining that efforts to relax investment restrictions are proper for the following reasons: (1) the current U.S. policies promote punitive rather than compensatory ends; (2) the restrictions have failed to work a change in Cuban leadership; (3) diplomatically, the restrictions have proven counterproductive by serving to create tension with U.S. allies; (4) the original "evil" to which the U.S. investment restrictions were aimed (expropriation of U.S.-held assets without compensation) is unlikely to be wholly corrected in light of the passage of time; and (5) the reintroduction of foreign direct investment flows between the United States and Cuba should assist the development of both countries.

Recognizing the mutual benefit available to states permitting the flow of foreign direct investment, the determination is reached that a reasoned approach to reducing, and ultimately ending, the investment restrictions is appropriate. By concluding the paper with a list of alternative ways to relax the current investment restrictions, the author writes with the hope of furthering discussions concerning U.S. financial policy regarding Cuba.

II. General Overview of the Role that Foreign Direct Investment Plays in Sovereign Relations

Following the rise to power in Cuba by Fidel Castro's government, foreign investors in the island nation found their assets expropriated. More recently, though, Cuba has been actively seeking foreign direct investment in order to promote development and fill the economic void caused by the cessation of Cold War subsidies. Even so, the prohibition on investment imposed by the United States has chilled capital input from international investors, while completely barring investment from would-be investors in the United States. Before discussing whether this chilling effect promotes the ultimate goals of the United States, however, the role that foreign direct investment plays in sovereign relations should be examined.

Generally speaking, foreign direct investment "occurs when a firm invests directly in facilities to produce and/or market a product in a foreign country."⁶ Private-sector entities or individuals typically make this type of investment with an equitable profit motive distinct from portfolio investment. As such, during the foreign direct investment process, the private investor must address both (1) the private-sector business concerns relating to the project, and (2) the governmental/regulatory procedures that are established in the home and host countries.⁷

6. CHARLES W. HILL, *INTERNATIONAL BUSINESS: COMPETING IN THE GLOBAL MARKETPLACE* 182 (3rd ed. 2002).

7. It is important to distinguish between foreign direct investment and either governmental aid, or portfolio investment. Foreign direct investment, as opposed to governmental aid, comes from the private sector (or entities acting in their private capacity), and represents a true investment with the risk-reward potential for profits and/or losses. Foreign direct investment should also be distinguished from portfolio investment, which is "investment by individuals, firms, or public bodies (e.g., national and local governments) in foreign financial instruments (e.g., government bonds, foreign stocks)." *Id.* at 182 (recognizing that "[foreign portfolio investment] does not involve taking a significant equity stake in a foreign business entity.").

The regulatory scheme that a country adopts to address the in-and-out transfer of foreign direct investment money depends upon the way in which the state views the propriety of foreign direct investment. Professor M. Sornarajah has grouped the theories addressing foreign direct investment into three theoretical categories that prove useful for analytical purposes: the classical theory, the dependency theory, and the middle path.⁸ The classical theory proposes "foreign investment is wholly beneficial to the host" economy.⁹ The dependency theory, in direct contrast, proposes "foreign investment will not bring about meaningful economic development," by arguing that foreign direct investment creates a dependency on the actors of developing countries, which cannot be overcome unless the ties created by foreign direct investment are broken.¹⁰ The middle path recognizes that foreign direct investment brings both positives and negatives and as such, the potential harms¹¹ accompanying activities of foreign investors in a host

8. M. SORNARAJAH, *THE INTERNATIONAL LAW ON FOREIGN INVESTMENT* 38 (Cambridge Univ. Press 1994).

9. *Id.* Sornarajah goes on to state:

There are several factors which are relied on to support this view. The fact that foreign capital is brought into a host state ensures that domestic capital available for use could be diverted to other uses of public benefit. The foreign investor usually brings with him technology which is not available in the host state, and this leads to the diffusion of technology within the host economy. There is new employment created, whereas, without foreign investment such opportunity for employment would have been lost. The labor that is so employed will acquire new skills associated with the technology which the foreign investor brings with him. Skills in the management of large projects will also be transferred to local personnel. Infrastructure facilities will be built, either by the foreign investor, or for the foreign investor, by the state and these facilities will be to the general benefit of the economy. The upgrading of facilities such as transport, health, or education to benefit the foreign investor will enure to the benefit of the society as a whole.

Id. at 38-39.

10. *Id.* at 43. Sornarajah continues:

The [dependency] theory focuses on the fact that most investment is made by multinational corporations which are headquartered in the developed countries, and which operate through subsidiaries in the developing countries. The proposition is that the multinational devises a global policy in the interest of its parent company, and its shareholders in the home country. As a result, the network of multinational corporations comes to serve the interests of the developed states in which they have their headquarters. The home states become the central economies of the world, and the states of the developing world become subservient, or peripheral economies serving the interests of the central economies of the home states of the multinationals.

Id.

11. *Id.* at 46-47. The harmful effects identified by adherents to the middle path, and which require regulation by the host country, are taken from various economic studies. The harmful effects include: (1) the use of transfer pricing to avoid taxes, and (2) abuses associated with the transfer of technology. Transfer pricing practices involve "fixing an artificially high price for an item permitted to be imported at concessionary rates bought from the parent company. Tax credits [are] later claimed on the basis of this artificial price." *Id.* at 47. With regard to technology transfers, restrictions on the use of technology often serve to prevent its dissemination, and at times the transferred technology is actually outdated or even hazardous.

economy, should be identified and regulated with the goal of minimizing the harms while permitting the investment positives to continue.

In addressing the history of investment relations between the United States and Cuba, Cuba strictly adhered to the dependency theory as justification for its large-scale expropriation of assets between 1959–1960. Such a theoretical approach to foreign investment directly collided with United States's application as a developed country of the classical theory.¹² It is interesting to note, however, that following the demise of the Cold War, Cuba's theoretical approach to foreign investment became much more aligned with the middle path.

III. History of Investment Relations between the United States and Cuba

From colonial times, the geographic proximity of Cuba off what would be the southeastern coast of the United States, naturally led to close economic relations between the two eventually sovereign states.¹³ Following Cuban independence from Spain on December 10, 1898, investment in Cuba by U.S. business interests increased substantially. In fact, "after the revolution the value of United States investment in Cuba had increased by

12. The United States arguably follows the free-market/classical theory of direct investment, as tinged by pragmatic-nationalism. While the export of investment income is unfettered in most instances, the United States may restrict foreign direct investment for national-security reasons. See Karla D. Whalen, *Exon-Florio and Open Investment: Are They at Odds in a World Where National Security No Longer Revolves Solely Around Military Might?* 17 SUFFOLK TRANSNAT'L L. REV. 59 (1994).

13. By the early 1800s, Cuba had developed into a sugar monoculture, attracting the attention of moneyed interests in the United States who were looking for business opportunities. See GORDON, *supra* note 1, at 3–4. In fact, the attraction was so strong that while Cuba was a Spanish colony, serious discussions were had in the United States about annexing Cuba: in 1783 John Adams, the second U.S. President, "indicated that Cuba was America's natural extension" and in 1825 his son (and eventual sixth U.S. President) John Quincy Adams, while acting as President James Monroe's Secretary of State, "insisted it was a law of nature that Cuba would one day 'gravitate only to the North American Union.'" PETER SCHWAB, *CUBA: CONFRONTING THE U.S. EMBARGO* vii (1999).

At least two negotiation rounds took place between the United States and Spain for the purchase of Cuba. "President Buchanan offered to purchase Cuba for \$100 million, rejected due to Spanish pride and relationships with England and France." GORDON, *supra* note 1, at 4 (citing A. WEINBERG, *MANIFEST DESTINY* 205–210 (1935)). "A new round of negotiations for the purchase of Cuba began in 1853, with overtones that the United States had adopted a more militaristic attitude toward Spain's continued domination of Cuba." *Id.*

Following the American Civil War, United States capital bolstered sugar production in Cuba and strengthened Cuba's economic ties with the United States; before Spain curtailed trade between Cuba and the United States for political reasons in the mid-1890s, Cuba accounted for about one-fourth of United States' world trade. See *Id.* at 5. Professor Michael Gordon proposes that U.S. investors interested in protecting their commercial interests, were a large political force behind the timing and actions of the United States in the Spanish American War, which led to recognition by Spain of Cuba's independence on December 10, 1898. See *Id.* at 7.

1925 from \$50 to \$265 million, nearly displacing European capital as the leading source of foreign investment."¹⁴ Foreign direct investment by U.S. interests in Cuba continued through the 1920s,¹⁵ and although it dipped during the Great Depression,¹⁶ by 1956, direct investment from U.S. investors is estimated to have been \$774 million (third in the Americas behind investment in Venezuela and Brazil).¹⁷

On New Year's Eve 1958, however, the investment relationship between the United States and Cuba changed when the revolutionist movement led by Fidel Castro assumed control of the Cuban government. A trickle of expropriation acts in 1959 aimed largely at U.S. interests¹⁸ turned into unfettered nationalization of assets in October 1960, when Cuba adopted Laws 890 and 891, nationalizing foreign investments and key private enterprises in accordance with newly adopted socialist principles initiated by the Castro regime.¹⁹ These socialist principles were set out in the Cuban Constitution at article 1, declaring Cuba to be a "socialist state of workers," and at article 5, stating that "the Communist Party of Cuba . . . organizes . . . and guides . . . the common efforts aimed at the highest goals of the construction of socialism and advancement toward the communist society."²⁰

Although the socialist ideals adopted by Castro's government were directly supported through economic aid and positively balanced trade from the Soviet Union between 1959

14. *Id.* at 16.

15. *See id.* at 19 (stating that "48.4 percent of Cuban sugar produced by United States owned mills in 1920, approached 75 percent by 1929. There also occurred an increase in electric power domination by the American and Foreign Power Company, and the growth of large United States owned banking branches . . . Cuba was undergoing a transformation into one of the many profit-making sectors of publicly owned United States corporations.").

16. One author on FDI in Latin America has stated:

With the onset of the Great Depression, investments in Latin America declined drastically. Funds were repatriated, reinvestment and new investment dried up, holdings were considerably devalued to fit new monetary standards and last, but not least, the Latin American republics themselves adopted economic controls, and nationalistic policies which effectively repulsed investors. Not until after 1945 did new capital enter Latin America, and most of that came from the United States.

MARVIN D. BERNSTEIN, *FOREIGN INVESTMENT IN LATIN AMERICA: CASES AND ATTITUDES* 11 (Alfred A. Konopf 1966).

17. GORDON, *supra* note 1, at 64 ns. 79–80 (citing U.S. Investments in the Latin American Economy, U.S. Department of Commerce (1957)).

18. *See id.* at 84 n. 54 ("It has been estimated that in 1959 alone, the government had seized property belonging to more than 5,000 individuals and more than 500 companies. Nearly all of the seizures in 1959 had been based either on the Agrarian Reform Law, or the law to recover stolen property.") (citations omitted).

19. *See* Venera A. Gallousis, Note, *Cuba's Flirtatious Love Affair with Foreign Investment: the Evolution of Laws 50 and 77*, 5 TEX. HISPANIC J.L. & POL'Y 81, 84 (Spring 2001) (citing Jorge F. Perez-Lopez, *The 1982 Cuban Joint Venture Law* 8 (1985)). The enactment of this new Cuban legislation meant that "[t]he nationalizations were no longer discriminatory acts toward the United States, they were now part of a complete elimination of foreign and domestic owned private investment, in all but the smallest businesses." GORDON, *supra* note 1, at 103.

20. Gallousis, *supra* note 19, at 83 (quoting CONSTITUCION DE LA REPUBLICA DE CUBA, arts. I & V).

and 1989, the aid ended with the demise of the Soviet Union.²¹ Cuba's loss of economic aid from Cold War alliances struck the Cuban economy hard.

The collapse of communism in Europe brought about a steep decline in the Cuban economy, which was dependent on the subsidies Cuba received from the Soviet Union, and on Cuba's advantageous trade with the nations of the Soviet bloc. Cuba's economic output declined by 50 percent between 1989 and 1993. During that period, the country's exports declined by 70 percent, imports dropped by 80 percent, and the gross domestic product decreased by about 40 percent.²²

Possibly foreseeing the decline in aid, Cuba began taking steps in the 1980s to wean its reliance on the Soviet system and court international investment. In 1982, Cuba enacted Decree-Law No. 50 On Economic Association Between Cuba and Foreign Entities (Law 50).²³ Law 50 permitted the creation of joint ventures, with up to 49 percent foreign ownership,²⁴ but generally proved unsuccessful in attracting foreign investment due in part to continuing restrictions on the ownership of private property.²⁵

Thus, in September 1995, Cuba repealed Law 50 and enacted a new foreign investment code via Decree-Law No. 77 Presentation of the Law on Foreign Investment (Law 77).²⁶ Law 77 only slightly modified the labor provisions enacted in Law 50.²⁷ It significantly bolstered, however, the provisions for foreign investment, including the recognition of private property and permitting 100 percent foreign capital companies.²⁸

21. See *id.* at 86 (citing ANA JULIA JATAR-HAUSMAN, *THE CUBAN WAY: CAPITALISM, COMMUNISM AND CONFRONTATION* 45 (1999)).

22. MATIAS F. TRAVIESO-DIAZ, *THE LAWS AND LEGAL SYSTEM OF A FREE-MARKET CUBA—A PROSPECTIVE FOR BUSINESS* 2 (1997) [hereinafter *TRAVIESO-DIAZ PROSPECTIVE*] (citations omitted).

23. See Gallousis, *supra* note 19, at 82 & 87 (citing Decreto-Ley Numero 50 Sobre Asociacion Economica Entre Entidades Cubanos y Extranjeras, reprinted in Jaime Suchlicki & Antonio Jorge, *Investing in Cuba: Problems and Prospects* 115 app. 1, at 115–26 (1994)).

24. As stated by Gallousis, the investment approach selected by Cuba via Law 50 was guarded:

Joint Ventures . . . had to meet certain nonnegotiable terms. They had to be domiciled in Cuba, of a temporary duration, and subject to the same regulations that applied to domestic corporations. In relation to the labor system, joint ventures had to employ Cuban workers, except in certain management, technical and highly skilled positions where foreigners readily had the necessary skills. However, they could not fire Cuban workers directly. A Cuban entity hired the workers, and in return for a fee, contracted with the foreign investment entity to provide the workforce. Regarding taxation, joint ventures were taxed 30 percent on net profits and 25 percent on Cuban personnel's payroll, which included social security contributions.

Gallousis, *supra* note 19, at 88 (citations omitted).

25. See *id.* at 92.

26. *Id.* at 82 & 94 (citing CONSTITUCION DE LA REPUBLICA DE CUBA art. 18, Presentation of the Law on Foreign Investment, Decree-Law No. 77 (Sept. 4, 1995)).

27. "Law 77's labor provisions retain the requirement that foreign investors must hire Cuban workers with limited exceptions, and investors must still contract Cuban employees through a Cuban agency." Gallousis, *supra* note 19, at 95.

28. See *id.*

Under article 12 of Law 77, foreign investment in Cuba can now be made in one of the following forms: as part of a joint venture, via an international economic association contract, or through an entirely foreign capital company.²⁹ Before an investment may be made, however, it must first be authorized. As one commentator states:

A foreign investment must be authorized by the Executive Committee of the Council of Ministers, or a Commission of the Executive Committee which will issue a resolution approving the foreign investment. There is no prescribed format dictating the contents of the resolution, and its contents are therefore, the result of negotiation between the parties to the joint enterprise and the government.³⁰

Thus, discretionary control over investment remains in the hands of the Cuban government.³¹

The United States's response to Cuba's mass expropriation of assets was the institution of an economic embargo in 1960, as ordered by President Dwight D. Eisenhower.³² President John F. Kennedy subsequently reinforced Eisenhower's efforts.³³ The embargo was justified under the statutory auspices of the Trading with the Enemy Act³⁴ and the Foreign Assistance Act of 1961.³⁵ Subsequently, all foreign direct investment in Cuba by "persons within the United States" was barred on 12:01 a.m. e.s.t., July 8, 1963.³⁶ This complete prohibition on investment, formalizing and extending the embargo previously affected by executive order, was enacted as part of the Cuban Assets Control Regulations.³⁷

29. See ROBERTO BRIER RIVERO, *LEGAL PROFILE OF FOREIGN INVESTMENT IN CUBA: 90 QUESTIONS* 59-60 (2nd ed. 1996) (taken from response to Question 1.1: "What types of foreign investment are permitted in Cuba?").

30. *Id.* at 60-61 (taken from response to Question 1.3: "What authorizations/registrations are required for a foreign investment?").

31. The enactment of Laws 50 and 77 by Cuba were intended to bring in foreign money while limiting foreign influence. In sum, the government of Cuba "wanted an isolated enclave of foreign investment and tourism, which could provide the hard currency and resources needed to maintain the rest of the social structure unchanged." See Gallousis, *supra* note 19, at 86.

32. See PATRICK J. KIGER, *SQUEEZE PLAY: THE UNITED STATES, CUBA AND THE HELMS-BURTON ACT* 20 (1997).

33. See Digna B. French, *Economic Sanctions Imposed by the United States Against Cuba: The Thirty-Nine Year Old Embargo Culminating with the Cuban Liberty and Democratic Solidarity (LIBERTAD) Act of 1996*, 7 U. MIAMI INT'L & COMP. L. REV. 1, (1999).

34. 50 U.S.C.A. App. § 1 (West 1990).

35. 22 U.S.C.A. § 2370 (West 1990 & Supp. 2002); See Cuban Assets Control Regulations, 31 C.F.R. 515.101 (1985). See also Matias F. Travieso-Diaz, *Practitioner's Note: So, Your Client Wants To Go To Havana...*, 6 NAFTA: L. & BUS. REV. AM. 277, 281 (Spring 2000) (recognizing that the embargo in its current form (after enactment of the Helms-Burton Act) is founded on three statutes: the Trading with the Enemy Act of 1917, the Foreign Assistance Act of 1961, and the Cuban Democracy Act of 1992) [hereinafter Travieso-Diaz Article].

36. Cuban Assets Control Regulations, 31 C.F.R. 515.201 (1963) (codifying 28 Fed. Reg. 6974 (July 9, 1963)).

37. See *id.*

Interestingly, the United States waited nearly three decades to state, in codified form, a policy rationale for the embargo.³⁸ In 1992 the United States set forth its "Statement of Policy" toward Cuba, via enactment of the Cuban Democracy Act, which states, "[i]t should be the policy of the United States . . . to seek a peaceful transition to democracy and a resumption of economic growth in Cuba through the careful application of sanctions directed at the Castro government and support for the Cuban people."³⁹ Through the Cuban Democracy Act, Congress also did the following: empowered the President to apply limited sanctions to any country assisting the Cuban government;⁴⁰ stated that "[t]he President should encourage the governments of countries that conduct trade with Cuba to restrict their trade and credit relations with Cuba;"⁴¹ provided for the limited export of food, medicines, and medical supplies to Cuba;⁴² and set out foreign relation policies for potential transitional and democratic governments in Cuba.⁴³

Four years after passage of the Cuban Democracy Act of 1992, the investment prohibitions in effect in the United States were codified and extraterritorially extended by Congress, with the passage of the Cuban Liberty and Democratic Solidarity (Libertad) Act, otherwise known as the Helms-Burton Act.⁴⁴ It is worth commenting that the passage of the Helms-Burton Act is generally agreed to have been, in large part, a response to Cuba's shooting down of two civilian aircraft piloted by Florida residents on February 24, 1996⁴⁵—the Helms-Burton Act became law less than three weeks later on March 12, 1996.

IV. Overview of the Helms-Burton Act

Until passage of the Helms-Burton Act, the prohibition of investment in Cuba (as imposed by the United States) was effected only by Regulation.⁴⁶ Although the Helms-Burton Act did little to change the pre-existing investment restrictions on U.S. nationals,

38. As recognized by Professor Irving Louis Horowitz, the consecration of the embargo policy "took place rather late in the policy game, so that the *de jure* policy came considerably after the *de facto* state of conflict that exists between the United States and Cuba." Irving Louis Horowitz, *Ethical and Political Consequences of the American Embargo of Cuba*, in *INVESTING IN CUBA: PROBLEMS AND PROSPECTS* 2-3 (Jaime Suchlicki & Antonio Jorge eds., 1994).

39. Cuban Democracy Act of 1992, 22 U.S.C.A. §§ 6001-6010 (West Supp. 2002). *Id.* § 6002.

40. *See id.* § 6003(a).

41. *See id.*

42. *See id.* § 6004.

43. *See id.* §§ 6006-6007.

44. The Helms-Burton Act is codified at 22 U.S.C. §§ 6021-6091. Notably the Helms-Burton Act has several consequences, but in accordance with the scope of this paper, the discussion will be limited to analyzing the investment aspects of the Act.

45. *See* Helms-Burton Act. *See also* Seymour J. Rubin, *Introductory Note—Organization of American States: Inter-American Juridical Committee Opinion Examining the U.S. Helms-Burton Act*, 35 I.L.M. 1322 (1996) ("[The Helms-Burton Act], generally thought to have been occasioned by the shooting down by Cuban aircraft of two civilian airplanes flown by anti-Castro Florida residents, aroused a storm of international controversy, centering on issues of extraterritoriality, and of alleged United States treaty commitment violations.") [hereinafter *Organization of American States*].

46. *See generally*, Cuban Assets Control Regulations, 31 C.F.R. 515 (1963).

it drew international attention and criticism for taking an additional enforcement step intended to create penalties against persons, regardless of nationality, trafficking in confiscated property.⁴⁷

Contained within the purposes of the Helms-Burton Act are the following goals: (1) "to assist the Cuban people in regaining their freedom and prosperity," (2) "to strengthen international sanctions against the Castro government," (3) "to provide for the continued national security of the United States in the face of continuing threats from the Castro government," (4) "to encourage the holding of free and democratic elections in Cuba," (5) "to provide a policy framework for United States support to the Cuban people in response to the formation of a transition government or a democratically elected government in Cuba," and (6) "to protect United States nationals against confiscatory takings and the wrongful trafficking in property confiscated by the Castro regime."⁴⁸

The Helms-Burton Act has four statutory parts. Title I⁴⁹ aims to strengthen international sanctions against Cuba. Title II⁵⁰ is intended "to [assist] a free and independent Cuba." Title III⁵¹ enacts provisions to protect the property rights of U.S. nationals who had property expropriated in Cuba. Title IV,⁵² likewise, provides for exclusion from the United States of aliens who have confiscated property of U.S. nationals, or who traffic in such property. Directly pertinent to foreign investment in Cuba are portions of Titles II, III, and IV.

In Title II of the Helms-Burton Act, section 6033 restricts the extension of a "loan, credit, or other financing" by U.S. nationals to "any person for the purpose of financing transactions involving any confiscated property, the claim to which is owned by a United States national as of March 12, 1996," unless the financing is accorded to the United States national owning the claim.⁵³ This prohibition limits itself to U.S. nationals and, in essence, simply restates the investment prohibition already in effect via regulation.

Titles III and IV of the Helms-Burton Act extend the regulatory prohibition on investment activity (which by regulation had been directed at U.S. nationals) to the investment activities of those outside the United States. Title III creates a cause of action, whereby a U.S. national who owned property expropriated by the Cuban government on or after January 1, 1959, may seek treble damages⁵⁴ against "any person" that "traffics"

47. See Helms-Burton Act.

48. *Id.* § 6022.

49. *Id.* §§ 6031–6046.

50. *Id.* §§ 6061–6067.

51. *Id.* §§ 6081–6091.

52. *Id.* § 6091.

53. *Id.* § 6033.

54. Damages (before trebled) are the sum of court costs, reasonable attorney's fees, and the greater of:

the amount, if any, certified to the claimant by the Foreign Claims Settlement Commission under the International Claims Settlement Act of 1949, plus interest . . . or the fair market value of that property, calculated as being either the current value of the property, or the value of the property when confiscated plus interest, whichever is greater.

Id. § 6082(a)(1)(I).

in such property.⁵⁵ The definition of one who "traffics"⁵⁶ in confiscated property is extremely broad, and would seem to encompass almost all activities in which a foreign investor might engage concerning Cuban property.⁵⁷ Discretion to suspend the effective date for creation of the cause of action (via successive 6 month suspension periods) was provided to the president.⁵⁸ To date, the effectiveness of the cause of action has been suspended, preventing the initiation of lawsuits.⁵⁹

Title IV of the Helms-Burton Act directs that foreign nationals who have confiscated, converted, or trafficked in the confiscated property of a U.S. national are to be denied entry into the United States.⁶⁰ If a foreign corporate entity is deemed to have confiscated, converted, or trafficked in confiscated property, then its directors, officers, and controlling shareholders may also be denied entry into the United States.⁶¹ Unlike the suspension of the retributive actions provided in Title III of the Helms-Burton Act, Title IV became effective on March 12, 1996⁶² and has been applied to deny certain aliens entry into the United States.⁶³

The Helms-Burton Act has been criticized, particularly with regard to Title III, for [c]onfusing a claim for damages or restitution, based on nationalization, with an action in rem to claim wrongfully 'confiscated property' and in addition with an action in personam for unjust enrichment from the use of such wrongfully 'confiscated property' by any person subsequently involved in such use in a broad-ranging and indeterminate manner.⁶⁴

55. *Id.* § 6082.

56. A person traffics in confiscated property if that person knowingly and intentionally—(i)(1) transfers, distributes, dispenses, brokers, or otherwise disposes of confiscated property; (II) purchases, receives, obtains control of, or otherwise acquires confiscated property; or (III) improves (other than for routine maintenance), invests in (by contribution of funds or anything of value, other than for routine maintenance), or begins after March 12, 1996, to manage, lease, possess, use, or hold an interest in confiscated property; (ii) enters into a commercial arrangement using or otherwise benefiting from confiscated property; or (iii) causes, directs, participates in, or profits from, trafficking (as described in clause (i) or (ii)) by another person, or otherwise engages in trafficking (as described in clause (i) or (ii)) through another person, without the authorization of any United States national who holds a claim to the property.

Id. § 6091(b)(2)(A).

57. Notably, the definition of traffics does not include "transactions and uses of property incident to lawful travel to Cuba, to the extent that such transactions and uses of property are necessary to the conduct of such travel." *Id.* § 6091(b)(2)(B)(iii).

58. *See id.* § 6085.

59. *See generally*, Jorge F. Perez-Lopez & Matias F. Travieso-Diaz, *The Helms-Burton Law and Its Antidotes: A Classic Standoff?* 7 SW. J.L. & TRADE AM. 95, 105–6 (2000).

60. *See* Helms-Burton Act § 6091.

61. *See id.* § 6091(a)(3).

62. *See id.* § 6091(d).

63. For example, in 1996, eleven executives from Sherritt International Corporation, a Canadian Mining entity, were barred entrance into the United States because of the Company's activities in Cuba. *See* Merrill Goozner, *U.S. Law Fails to Scare Canada Firms Out of Cuba: Helms-Burton Act Ignored as Trade Between 2 Picks Up*, CHI. TRIB., June 16, 1997, at 4.

64. Organization of American States, *supra* note 45, at 1331 ¶ 4(g) (1996).

However, the Helms-Burton Act did not inadvertently move from mere restitution demands (to be brought by a state on behalf of its citizens) to the creation of individual causes of action against property or third parties. As stated in the act itself, one purpose of the legislation was to "protect United States nationals against confiscatory takings and the wrongful trafficking in property confiscated by the Castro regime."⁶⁵ Congress wanted to chill investment in Cuba from all sources by exposing investors to a biting liability scheme and a disruptive border-crossing policy.⁶⁶

The timing of the Helms-Burton Act is noteworthy. In 1995, just a few years after Cuba lost its economic aid from the Soviet Union, the Cuban government substantially revamped its national investment law through passage of Law 77. As discussed above, this new law was a progressive step built on prior efforts (i.e., Law 50) to move Cuba away from the radical theories of foreign direct investment⁶⁷ followed during the mass expropriations of 1960. In essence, Cuba was moving from a period highlighted by the nationalization of assets, to a period where foreigners were being reinvited to have a more active role in the Cuban economy. Despite this progress in Cuba, and even having seen by example the devastation caused to socialist ideology when the economies of Eastern Europe were opened to direct investment, Congress still passed the Helms-Burton Act in March 1996 (just months after the enactment of Law 77 in Cuba). Instead of extending a hand and proactively promoting the Cuban accessions toward a freer economy, Congress threw down the proverbial gauntlet.

V. International Reaction to the Helms-Burton Act

The passage of the Helms-Burton Act served to statutorily reiterate the U.S. ban on direct investment in Cuba. The Helms-Burton Act, however, went one step further by proactively establishing a framework to chill investment from non-U.S. nationals.⁶⁸ It is not an exaggeration to say that passage of the Helms-Burton Act by the United States met almost universal opposition from international organizations and sovereign states.

The United Nations adopted ten resolutions in as many years recognizing the necessity of ending the economic, commercial and financial embargo imposed by the United States of America against Cuba.⁶⁹ The most recent resolution continues the trend of

65. Helms-Burton Act at § 6022(6).

66. See generally *id.*

67. See General Overview of the Role that Foreign Direct Investment Plays in Sovereign Relations *supra* Part II.

68. See Titles III and IV of the Helms-Burton Act discussion *supra* Part IV.

69. G.A. Res. 19, U.N. GAOR, 47th Sess., U.N. Doc. A/47/19 (1992); G.A. Res. 16, U.N. GAOR, 48th Sess., Agenda Item 30, U.N. Doc. A/48/16 (1993); G.A. Res. 9, U.N. GAOR, 49th Sess., Agenda Item 24, U.N. Doc. A/49/9 (1994); G.A. Res. 10, U.N. GAOR, 50th Sess., Agenda Item 27, U.N. Doc. A/50/10 (1995); G.A. Res. 17, U.N. GAOR, 51st Sess., Agenda Item 27, U.N. Doc. A/51/17 (1996); G.A. Res. 34, U.N. GAOR, 52nd Sess., U.N. Doc. A/52/34 (1997); G.A. Res. 4, U.N. GAOR, 53th Sess., Agenda Item 29, U.N. Doc. A/53/4 (1998); G.A. Res. 21, U.N. GAOR, 54th Sess., Agenda Item 33, U.N. Doc. A/54/21 (1999); G.A. Res. 20, U.N. GAOR, 55th Sess., U.N. Doc. A/55/20 (2000); G.A. Res. 9, U.N. GAOR, 56th Sess., Agenda Item 34, U.N. Doc. A/56/9 (2001).

specifically expressing concern

about the continued promulgation and application by Member States of laws and regulations such as that promulgated on 12 March 1996 known as the "Helms-Burton Act," the extraterritorial effects of which affect the sovereignty of other States, the legitimate interests of entities or persons under their jurisdiction and the freedom of trade and navigation.⁷⁰

In the Western Hemisphere, the Organization of American States (OAS) likewise reacted strongly to passage of the Helms-Burton Act.⁷¹ It is the opinion of the OAS that the Helms-Burton Act "does not conform to international law" in eight respects:

- a) The domestic courts of a claimant State are not the appropriate forum [sic] for the resolution of State-to-State claims.
- b) The claimant State does not have the right to espouse claims by persons who were not its nationals at the time of injury.
- c) The claimant State does not have the right to attribute liability to nationals of third States for a claim against a foreign State.
- d) The claimant State does not have the right to attribute liability to nationals of third States for the use of expropriated property located in the territory of the expropriating State, where such use conforms to the laws of this latter State, nor for the use in the territory of third States of intangible property or products that do not constitute the actual asset expropriated.
- e) The claimant State does not have the right to impose liability on third parties not involved in a nationalization through the creation of liability not linked to the nationalization, or unrecognized by the international law on this subject, thus modifying the juridical bases for liability.
- f) The claimant State does not have the right to impose compensation in any amount greater than the effective damage, including interest, that results from the alleged wrongful act of the expropriating State.
- g) The claimant State may not deprive a foreign national of the right, in accordance with due process of law, to effectively contest the bases and the quantum of claims that may affect his property.
- h) Successful enforcement of such a claim against the property of nationals of a third State, in a manner contrary to the norms of international law, could itself constitute a measure tantamount to expropriation and result in responsibility of the claimant State.⁷²

70. See *Necessity of Ending the Economic, Commercial and Financial Embargo Imposed by the United States of America Against Cuba*, G.A. Res. 34, U.N. GAOR, 56th Sess., Agenda Item __, at Preamble, U.N. Doc. A/56/9 (2001).

71. "The General Assembly Resolution [of the OAS]—with the U.S. in solitary dissent—was unusually vigorous. Ordinarily, the General Assembly would 'request' an opinion of the Juridical Committee; in this case it 'directed' the Committee to formulate its opinion and to do so 'as a matter of priority.' This deviation from normal diplomatic delicacy of style may have reflected considerable irritation at what may have been perceived as U.S. arrogance with respect to the foreign policies of other sovereign states." Organization of American States, *supra* note 45, at 1322.

72. Organization of American States, *supra* note 45, at 1332 ¶ 6.

On a multilateral level, the European Communities threatened to proceed with dispute settlement procedures against the United States before the World Trade Organization. Although these claims were eventually dropped through consultations and negotiations, the political capital expended by the United States in the process was significant.⁷³

Following suit on the level of bilateral relations, there were strong reactions to the Helms-Burton Act. Several governments went so far as to enact blocking statutes or antidote laws in direct response to Helms-Burton.

Canada, Mexico, the European Union, and Argentina have all enacted 'blocking statutes' intended to counteract not only the Helms-Burton Act but, more broadly, other foreign legislation perceived to have extraterritorial reach. Spain reportedly considered enacting a Helms-Burton antidote in the summer and fall of 1996, but did not follow through in view of the anticipated joint action by the European Union.⁷⁴

Arguably by inciting such strong international reaction to the Helms-Burton Act, the United States shifted the world's indignation away from wrongful expropriations and the Cuban democracy gap, instead raising questions about the overextension of U.S. sovereignty rights. This has done little to inspire other nations to work together with the United States in a common policy of addressing the Castro government in Cuba.

VI. Analysis of the Appropriateness and Effectiveness of Existing Investment Restrictions

The Helms-Burton Act and the regulatory schemes predating it were a direct response to the uncompensated expropriation by Cuba of substantial assets owned by U.S. nationals. They were further justified as necessary to protect national security.⁷⁵ In analyzing the investment restrictions invoked by the United States as to Cuba, one must take these motives into consideration, and ask whether the United States appropriately instituted investment restrictions. One must also ask whether the investment restrictions currently in place are effective in meeting U.S. policy goals.

A. APPROPRIATENESS OF THE UNITED STATES INVESTMENT RESTRICTIONS

The extent of Cuban expropriation with regard to U.S. nationals was tremendous:

Between 1959 and 1960, the government of Cuba seized properties belonging to United States nationals with an estimated value of \$1.8 billion. . . . This magnitude is greater than the total amount expropriated by all other Communist countries combined, including the Soviet

73. See generally, Stefaan Smis & Kim Van der Borgh, *The EU-U.S. Compromise on the Helms-Burton and D'Amato Acts*, 93 AM. J. INT'L L. 227 (1999).

74. Perez-Lopez & Travieso-Diaz, *supra* note 59, at 114-115 (citations omitted.)

75. See generally Helms-Burton Act § 6022 (including the goals of "protect[ing] United States nationals against confiscatory takings and the wrongful trafficking in property confiscated by the Castro regime" and of "provid[ing] for the continued national security of the United States in the face of continuing threats from the Castro government").

Union, Poland, Rumania, Czechoslovakia, Hungary, Yugoslavia, and Bulgaria. Of this sum, nearly \$1.6 billion represents the certified claims of corporations; the value of properties taken from individuals is estimated at \$221 million.⁷⁶

To date, U.S. nationals who had property expropriated have yet to be compensated. Including interest, estimates of the current value of compensation claims held by U.S. citizens approximate six billion.⁷⁷

A taking by a sovereign nation may either be an unjustified confiscation without a public purpose, or a nationalization for the public good. The nationalization for a public good is a lawful taking under international law so long as it is not discriminatory.⁷⁸ The definition of public good is open-ended, though, permitting a sovereign leeway to expropriate so long as it does so within the sovereign's public role.⁷⁹

If a sovereign does expropriate property for a public purpose, it then has a duty under international law to compensate the previous property holder.⁸⁰ Admittedly, there

76. Eric N. Baklanoff, *Praeger Special Studies in International Economics and Development, EXPROPRIATION OF U.S. INVESTMENTS IN CUBA, MEXICO, AND CHILE* 131 (1975).

77. With regard to U.S. assets expropriated by Cuba, one can look to the claims made before the Foreign Claims Settlement Commission (FCSC) to estimate the value of the seized property for which U.S. citizens and nationals are still awaiting compensation. Claims were brought before the FCSC as part of the Cuban Claims Program, by which Congress authorized the FCSC to determine the validity and amount of claims. See Travieso-Diaz Article, *supra* note 35, at 284–85 (citing the International Claims Settlement Act, 22 U.S.C. §§ 1643 *et seq.* (1988) (amended in 1994)). As summarized:

The Cuban Claims Program of the FCSC was active between 1966 and 1972. During that time, it received 8,816 claims—1,146 by U.S. corporations and 7,670 by individual citizens. It certified 5,911 of those claims, with an aggregate amount of \$1.8 billion; denied 1,195 claims, with an aggregate amount of \$1.5 billion; and dismissed without consideration, or saw withdrawn, 1,170 other claims. The value of the certified Cuban claims exceeds the combined certified amounts of all other claims validated by the FCSC for expropriation of U.S. nationals' assets by other countries. Of the \$1.8 billion in certified claims, over 85 percent (about \$1.58 billion) corresponded to 898 corporate claimants, and the rest (about \$220 million) was spread among 5,013 individual claimants. Although the Cuban Claims Act did not expressly authorize the inclusion of interest in the amount allowed, the FCSC determined that simple interest at a 6 percent rate should be included as part of the value of the claims it certified. Applying such an interest rate on the outstanding \$1.8 billion principal yields a present value of about \$6 billion. This amount does not include the value of the claims that were disallowed for lack of adequate proof, nor those that were not submitted to the FCSC during the period specified in the statute.

Id. at 285. Thus, strictly construing the prompt, adequate, and effective compensation requirements of international law (and permitting interest for the failure to comply promptly), U.S. interests have claims amounting to approximately \$6 billion.

78. Sornarajah, *supra* note 8, at 315 ("Taking of foreign property by a state is *prima facie* lawful. Such legality is, however, conditional. The taking of foreign property will be lawful only if such taking was for a public purpose and is not discriminatory.")

79. *Id.* at 316 ("It is generally conceded that the requirement of public purpose for a taking is not much of a limitation in modern times.")

80. See *id.* at 315.

is some dispute internationally as to the standard of compensation,⁸¹ although a consensus is developing that the form of the compensation should fit into the all too nondescript category of "prompt, adequate and effective."⁸² Some also argue that the expropriating state should permit the property owner administrative or judicial recourse during the expropriation process.⁸³

The expropriation of foreign assets by Cuba stands in violation of international law, but this is clear only with respect to the failure by Cuba to provide compensation. No apparent discrimination existed in the expropriation actions, as the nationalization efforts affected nationals and foreigners (regardless of nationality) alike. The malleability

81. *See id.*

82. *See* Organization of American States, *supra* note 45, at 1331 ¶5(a).

83. Generally speaking, international bodies and institutions agree with the above analysis. *See* North American Free Trade Agreement, Dec. 17, 1992, 32 I.L.M. 605, Art. 1110(1) (1993). By way of further example, below are the principles and rules concerning expropriation as interpreted and adopted by the Organization of American States:

- a) Any state that expropriates, nationalizes, or takes measures tantamount to expropriation, or nationalization of property owned by foreign nationals must respect the following rules: such action must be for a public purpose, nondiscriminatory, and accompanied by prompt, adequate and effective compensation, granting to the expropriated party effective administrative or judicial review of the measure and quantum of compensation. Failure to comply with these rules will entail State responsibility.
- b) The obligation of a State in respect of its liability for acts of expropriation, consists of the restitution of the asset expropriated or adequate compensation for the damage caused, including interest up to the time of payment.
- c) When a national of a foreign State is unable to obtain effective redress in accordance with international law, the State of which it is a national may espouse the claim through an official State-to-State claim. It is a condition for such espousal, that from the time of the occurrence of the injury until the settlement of the claim, the holder thereof must without interruption have been a national of the claimant State, and not have the nationality of the expropriating State.
- d) Claims against a State for expropriation of the property of foreign nationals cannot be enforced against the property of private persons, except where such property is itself the expropriated asset, and within the jurisdiction of the claimant State. Products grown or produced on such property do not, under customary international law, constitute expropriated property.
- e) Any use by nationals of a third State of expropriated property located in the expropriating State, where such use conforms to the laws of that State, as well as the use anywhere of products or intangible property, not constituting the expropriated asset itself, does not contravene any norm of international law.
- f) The nationals of foreign States have the right to due process of law in all judicial or administrative procedures that may affect their property. Due process includes the possibility of effectively contesting both the basis and quantum of the claim in a legal or administrative proceeding.

Organization of American States, *supra* note 45, at 1331-32 ¶ 5. The Juridical Committee of the OAS deemed that the above-set forth "principles and rules are generally accepted by the Member States" after considering "the rules of international law applicable to diplomatic protection, State responsibility, and the minimum rights of aliens regarding the protection of property rights of nationals." *Id.*

of the public purpose requirement makes difficult to raise a successful challenge against Cuba's sovereign determination that the nationalizations were for the public good. And, although the international requirement that foreign investors facing expropriation be accorded procedural recourse via the courts, or administrative action does not appear to have been met, one can argue that the true purpose of the accommodation of procedural rights is simply to ensure compensation, non-discrimination, and the existence of a public purpose.

Because Cuba failed to provide "prompt, adequate and effective" compensation, thus violating the international law on expropriations, one can solidly argue that the investment restrictions imposed by the United States were "appropriate" as a tool of sovereign pressure.⁸⁴ This is especially so as to the initial regulatory prohibitions on investment, which were largely restricted in scope to U.S. nationals, and which involved a like retaliatory measure (restricting U.S. nationals from investing in Cuba because of actions taken by the Cuban government against U.S. investors).

Taking the analysis one step further, however, one must ask whether the United States's use of an investment prohibition policy to achieve (at least in part) the goal of compensation for its nationals remains realistic after more than forty years. The hard truth is that time has been on the side of Castro's government.⁸⁵ From the perspective of those whose property was expropriated, if any compensation is ever received, it will probably never be adequate or effective.

Until recently, Cuba has unrelentingly refused to compensate investors suffering losses caused by its expropriations. Even through recent statements in November 2001, Cuba appears to be laying the groundwork to try and bargain away full monetary compensation to U.S. investors, with alleged economic harms caused to the Cuban people by the U.S. embargo.⁸⁶ Also worth mentioning, if the Castro government were replaced anytime soon, it is unlikely that the Cuban treasury will be in a position to make adequate

84. Admittedly, some criticize the application of the embargo as a whole. See, e.g., *supra* notes 69–73 and accompanying text. Additionally, the validity of the Helms-Burton Act under international law has also been attacked. See discussion *supra* Part V.

85. This point poses interesting and unresolved questions. For how long should a state continue to be able to claim that its citizens are entitled to compensation for expropriated assets? Is there, or should there be, a time bar (i.e., laches or a staleness period) to compensation claims? These are difficult and vexing questions not answered here, but the author's observation is that at some point, a state should soften its stance in order to move on with positive sovereign relations. What that time period should be is hard to say, but at some point all the natural persons actually injured (or even their heirs) will have passed away, and all the corporate persons still in existence will have written-off the losses without a realistic hope of substantial recovery. At the same time, however, the author recognizes that a state should not benefit, simply due to the running of an arbitrary time period, for uncompensated expropriations.

86. As already discussed, in November of 2001, Cuba's Minister of Foreign Affairs recognized the compensation rights of those United States citizens who had property nationalized. See Statement of Mr. Felipe Pérez Roque, *supra* note 4. This recognition was made during a statement before the General Assembly of the United Nations, and although it represents a huge concession by Cuba, it was made while Cuba also indicated that any agreement on compensation would need to take "into account the extremely burdensome economic and human hardships inflicted on [Cuba] by the blockade." Statement of Mr. Felipe Pérez Roque, *supra* note 4.

and effective compensation, when faced with the daunting task of facilitating economic growth. Thus, as will be discussed in Part VII, below, alternative approaches to effecting compensation should be evaluated.

B. EFFECTIVENESS OF INVESTMENT RESTRICTIONS IN THE POLITICAL AND SOCIAL REALMS

The United States's efforts to prohibit investment in Cuba initially, may have been an appropriate response to the uncompensated expropriation of assets in 1959–1960, but one must also remember that the policy rationale and objectives behind the investment restrictions (both in their regulatory and statutory form), extend beyond the goal of compensation. The embargo and accompanying prohibition on investment also were established for the purposes of pressuring the Castro regime to permit Cuban citizens additional freedoms, addressing the Communist foothold gained off the U.S. coast, and ultimately driving the Castro government out of power.⁸⁷ By restricting the flow of direct investment into Cuba, however, the United States has also restricted the influence and privatization-minded objectives that accompany direct investment money. Today Castro remains in power, and there is no U.S. business presence on the island of Cuba.

The fact that U.S. imposed investment restrictions have chilled investment in Cuba is indisputable. U.S. citizens are not permitted to invest in Cuba, a country that historically has been of significant importance to the economic development of the United States.⁸⁸ Moreover, economic data collected by the U.S. government, suggests that foreign investment in Cuba was moderated by passage of the Helms-Burton Act in 1996:

Our efforts to discourage foreign investment in properties confiscated from United States citizens have helped slow the pace of investment in Cuba. We monitor foreign investment on the island carefully, as part of our effort to enforce the Libertad [a/k/a Helms-Burton] Act enacted in March 1996. In doing so, we have developed estimates of the level and type of foreign investment in Cuba. As of December, we estimate foreigners have invested \$1.7 billion in Cuba since 1990. The largest sectors are telecommunications—with \$650 million, mining—with \$350 million, and tourism—with \$200 million. We estimate foreigners have signed firm commitments to invest another \$1.6 billion during the same period, of which tourism-related projects account for \$950 million. These numbers show relatively modest growth since December 1995, when Cuban Vice President Carlos Lage announced that Cuba had received \$2.1 billion in foreign investment, of which only half had been delivered.⁸⁹

Does this limited success at chilling some foreign investment justify the sacrificed costs?

The international political costs have been high for the United States. The world community responded in uncharacteristically harsh diplomatic language to the Helms-Burton Act, and acted in ways that led the United States to expend political capital

87. The Cuban Democracy Act of 1992, 22 U.S.C.A. § 6001, *et seq.* (West 1990 & Supp. 2002) sets forth the policy behind the U.S. embargo and investment prohibition. See discussion *supra* Part III.

88. See discussion of historical economic ties between the United States and Cuba *supra* Part III.

89. John R. Hamilton, *Cuba: Economic Transition and U.S. Policy—Remarks on Mar. 25, 1999*, available at: <http://usinfo.state.gov/regional/ar/us-cuba/hamil25.htm> (last visited Oct. 4, 2001).

and resources to prevent nations of the world from taking retributive action.⁹⁰ Castro's socialist regime remains in power, and investments are being made in Cuba, just not from citizens of the United States.⁹¹ The logic of obtaining market share by being the first into a market, which in this case is a market to be developed fully after the end of the Castro regime, is not being followed. It would be one thing if the United States could say to its nationals that no one else is investing, but the fact is that key sectors likely to bring substantial investment by U.S. interests, namely tourism⁹² and mining, are already seeing investor toeholds gained by foreign investors.⁹³

Even a review of the spin placed on future U.S. investment in Cuba by the U.S. State Department demonstrates that investment funds are available to readily flow into Cuba upon the lifting of the economic restrictions:

We believe our efforts to help the Cuban people prepare for the inevitable transition are working. When democracy and the free market do return to Cuba, the United States will have an important economic role to play in the transition. In January 1997, an inter-agency team submitted a report to Congress estimating that Cuba would receive some \$4–8 billion in external financial assistance from private and public sources during the first 6 years of the transition We expect the American business community will find a democratic Cuba attractive for several reasons. Besides its proximity to the United States, the country is rich in physical and human resources. The reemergence of United States tourism offers significant opportunities for growth.⁹⁴

Logically, should it make economic sense to invest in Cuba, interests in the United States will make investments if they are no longer barred by restrictions.

As discussed earlier, through the passage of Law 77 in 1995, Cuba made a progressive step toward a legal regime that seeks to entice foreign investors with the implementation of previously lacking investor safeguards. While hanging on to dependency ideology to some extent, Cuba now also has one foot squarely within the "middle path" approach

90. See discussion of the international reaction to the Helms-Burton Act *supra* Part V.

91. See TRAVIESO-DIAZ PROSPECTIVE, *supra* note 22 at 2 (recognizing that in the mid-1990s major investments were announced and made in Cuba, "especially in the areas of mining and tourism").

92. As reported by the U.S. Department of State:

In the mid 1990s, tourism surpassed sugar, long the mainstay of the Cuban economy, as the primary source of foreign exchange. Tourism figures prominently in the Cuban Government's plans for development, and a top official cast it as the "heart of the economy." Havana devotes significant resources to building new tourist facilities and renovating historic structures for use in the tourism sector. Cuban officials estimate roughly 1.6 million tourists visited Cuba in 1999, with about \$1.9 billion in gross revenues. The official projections for 2000 are only slightly higher than in 1999. Independent analysts and journalists partially attributed low numbers in January to Y2K concerns.

Bureau of Western Hemisphere Affairs, U.S. Dept. of State, *Background Note: Cuba (09/01)*, available at: <http://www.state.gov/r/pa/bgn/index.cfm?docid+2886#econ> (last visited Nov. 2, 2001).

93. See TRAVIESO-DIAZ PROSPECTIVE, *supra* note 22, at 2.

94. Hamilton, *supra* note 89.

to foreign direct investment. Commentators, including Sornarajah,⁹⁵ recognize that the dependency theory⁹⁶ has been falling out of favor. As stated by Professor Charles Hill, whose categorizations of foreign direct investment theories generally mirror those of Sornarajah, but are titled "the free market view" (*cf.* classical theory), "the radical view" (*cf.* dependency theory), and "pragmatic-nationalism" (*cf.* middle path):

By the end of the 1980s; however, the radical position was in retreat almost everywhere. There seem to be three reasons for this: (1) the collapse of communism in Eastern Europe; (2) the generally abysmal economic performance of those countries that embraced the radical position, and a growing belief by many of these countries that FDI can be an important source of technology and jobs, and can stimulate economic growth; and (3) the strong economic performance of those developing countries that embraced capitalism rather than radical ideology (e.g., Singapore, Hong Kong, and Taiwan).⁹⁷

The loss of Soviet subsidies and Cuba's failure to develop a flourishing self-sufficient economy (as contrasted to the benefits reaped by Cuba's neighboring countries that sought foreign investment),⁹⁸ forced Cuba to look at outside capital investment as a way to bolster its economy and improve the lives of its citizens. The benefits of foreign direct investment to Cuba,⁹⁹ as recognized under the pragmatic-nationalism/middle path and

95. "But, even within Latin America, the attraction of the theory seems spent at the present time." SORNARAJAH, *supra* note 8, at 44.

96. As discussed *supra* Part II, the dependency/radical view of foreign direct investment found its roots in Marxism. See HILL, *supra* note 6, at 208 ("The radical view traces its roots to Marxist political and economic theory. Radical writers argue that the multinational enterprise (MNE) is an instrument of imperialist domination. They see the MNE as a tool for exploiting host countries to the exclusive benefit of their capitalist-imperialist home countries."). See also SORNARAJAH, *supra* note 8, at 44-45 ("Dependency theorists see economic development not in terms of flow of resources to the host state, but as involving the meaningful distribution of wealth to the people of the state. . . . [T]here cannot be development until the people as a whole are freed from poverty and exploitation. Development becomes a right of the people rather than that of the state.")

97. HILL, *supra* note 6, at 209.

98. "The increasingly powerful trend towards economic globalization has produced a massive rise in world FDI flows. Latin America and the Caribbean have not been by-passed by this phenomenon, largely because countries in the region have reoriented their development policies to stress trade and investment liberalization, market deregulation, and the key role of the private sector." INTER-AMERICAN DEVELOPMENT BANK AND INSTITUTE FOR EUROPEAN-LATIN AMERICAN RELATIONS, FOREIGN DIRECT INVESTMENT IN LATIN AMERICA IN THE 1990s 1 (1996) (recognizing at page 27 that capital flows into Latin America between 1991-1994 averaged U.S. \$53 billion per year).

99. It should be noted, that while foreign direct investment can arguably benefit Cuba and its people, investment opportunities, and a stable economic regime must exist to inspire foreign investment in Cuba. This was aptly demonstrated by the fact that Law 50 failed to incite investment in Cuba due to its limitations on private property ownership and controlling interests in Cuban corporate entities. See discussion *supra* Part III. See also TRAVIESO-DIAZ PROSPECTIVE, *supra* note 22, at 5 (setting forth a checklist of "Cuba's minimum economic and political changes" for investment by American business interests).

free-market/classical theories, are varied and potentially include:¹⁰⁰

- (1) Increased supplies of capital and hard currency.
- (2) Technological improvement of the manufacturing process, and in turn, improved technological goods being made available to Cuban citizens at a better price.
- (3) New jobs as foreign investors hire Cuban workers in newly established ventures.
- (4) Management and technical training for Cuban employees.
- (5) Improvement of the Cuban balance of payment situation.¹⁰¹

Foreign direct investment is also directly affected by the actions of an investor's home country. By prohibiting investment in Cuba, the United States is using a pressuring tactic that runs counter to its policy of generally permitting the export of investment capital.¹⁰² Moreover, the ability of the United States to implement/continue a successful embargo is less effective now than in the early 1960s, when the United States could better exert its dominant economic world power. "What structural trends show is a general decline in American capacity to influence and in opportunities to wield embargoes effectively."¹⁰³

While U.S. investment prohibitions remain in place, U.S. business interests are not afforded the chance to take advantage of what they deem to be positive investment opportunities in Cuba, the Cuban people are denied the benefits and growth likely to accompany the investment, and the United States loses the ability to encourage the workings of the invisible economic hand (as understood to operate under the free market theory). Moreover, the chilling effect the Helms-Burton Act has had on non-United States international investment in Cuba, hampers the benefits of foreign direct investment and, arguably, permits the socialist regime to continue tempting the pro-democratization effects of foreign investment. If investment were permitted to flow into Cuba, the ensuing empowerment of the Cuban people (as gained through better jobs, access to hard dollars, and the availability of choices in the marketplace) has the potential to inspire democratic reform not produced by the embargo and investment prohibition.

100. See generally, HILL, *supra* note 6, at 213–218.

101. "A country's balance of payments accounts keep track of both its payments to and its receipts from other countries." HILL, *supra* note 6 at 215.

102. See discussion *supra* endnote 12.

103. RICHARD J. ELLINGS, *EMBARGOES AND WORLD POWER: LESSONS FROM AMERICAN FOREIGN POLICY* 60 (1985). Ellings goes on to state:

Yet relative to its position in 1950 or 1960, or even 1970, the U.S. faces a more intractable, competitive global environment. There is greater complexity and power at the lower ends of the international hierarchy—from political as well as economic and military development. . . . In short, the U.S. supplies smaller proportions of the world's intake of order-keeping, and especially economic goods and services. Its bargaining position versus other states has weakened. At the same time, the general level of global interdependence seems to have risen, especially in regard to integration of the American economy. As the U.S. declined relative to others, it became more subject to the vagaries of the international economy.

Id. at 59–60.

VII. Proposals for Amending the Ban Imposed by the United States on Foreign Investment in Cuba

Investment restrictions by the United States need to be revamped or even lifted. More than forty years after Castro's government took power and nationalized property in Cuba, his government remains in control, and U.S. property owners suffering through expropriation have not received compensation. Although difficult to accept, it is unlikely that full compensation will come directly from Cuba. By continuing its policy of prohibiting U.S. nationals from investing in Cuba, and by chilling investment in Cuba from foreign interests through the Helms-Burton Act, the United States continues to ineffectively utilize significant resources of political and economic capital. Finally, even though one purpose of the embargo (and resulting investment prohibition) is to pressure the Marxist government of Cuba out of power, economic theory, backed by anecdotal evidence from Eastern Europe, suggests that permitting the flow of foreign investment into Cuba is more likely to lead to this ultimate purpose, than preventing direct investment funds from reaching Cuba.

Even in the face of the strictures of the Helms-Burton Act, it cannot be forgotten that U.S. law states one policy goal with regard to Cuba is "to be prepared to reduce sanctions in carefully calibrated ways in response to positive developments in Cuba."¹⁰⁴ As discussed above, Cuba now permits direct investment and the ownership of private property by foreigners. Cuba has also made diplomatic overtures indicating its willingness to negotiate the provision of reparations to individuals and businesses that had property expropriated. These are positive developments, and arguably an increase in the flow of foreign direct investment in Cuba will create opportunities for its people. By amending its law to permit investment in Cuba, moreover, the United States could speed the crumbling of Communism in Cuba (as was seen in the former Soviet Bloc after the announcement of Perestroika).

The ban on foreign direct investment in Cuba is a politically charged issue. Policymakers in the United States are faced with the cold-war remains of a Socialist dictatorship off their southeastern coast that has been criticized for the treatment of its citizens,¹⁰⁵ and that has nationalized property of U.S. citizens without compensation. This represents a political, moral, and economic situation that lent itself to tough action. Policymakers, however, also are hearing the call to open up investment in Cuba in an effort to (1) permit the invisible hand of capitalism to stir the people of Cuba to a better standard of living,¹⁰⁶ and (2) allow U.S. investors a toe-hold in a Cuban economy which will likely change upon the end of Fidel Castro's leadership.

104. 22 U.S.C.A. § 6002(7).

105. See generally Helms-Burton Act. "The United Nations Commission on Human Rights has repeatedly reported on the unacceptable human rights situation in Cuba, and has taken the extraordinary step of appointing a Special Rapporteur." *Id.* § 6021(20).

106. As stated by Travieso-Diaz:

Those who have studied processes in other countries, similar to the one Cuba is undergoing, predict that Cuba's ongoing 'Socialist transition' is doomed to fail. As the Hungarian analyst Janos Kornai has pointed out, a Socialist system is incapable of moving away from its rigid economic structure, while at the same time retaining its Socialist character. . . . According to Kornai, the rise of the private sector is the most important internal development that brings out the contradictions in a Socialist system, and ultimately, causes its involuntary transition into a market economy. A rise in

The Helms-Burton Act, while raising international objections, has served to become a hindrance to positive relations between the United States and Cuba. By passing the act, the United States statutorily indicated that it would continue investment restrictions until Cuba's government was replaced. From the perspective of the Cuban leadership, this is an ultimatum to which they cannot willingly accede. However, should the trigger for investment permissibility be amended, both sides can save face and investment can resume.

Because it may be impractical and politically difficult to quickly repeal the Helms-Burton Act and its extraterritorial aspects, the best possible way to come up with a mutually acceptable solution is to devise a package of concessions. The United States is in a position to negotiate with Cuba now that the island nation is actively seeking foreign direct investment. Possible approaches to ending the investment prohibition include amending the Helms-Burton Act to: (1) permit investment upon Cuba's implementation of certain employment standards and job opportunities; (2) adopt a tiered approach to investment, whereby investment rights would initially be permitted to persons who had their property expropriated by Cuba in 1959 and 1960, before investment in Cuba is opened to all U.S. nationals; (3) allow for the negotiation of a discounted compensation schedule for the owners of expropriated property based upon the recent Cuban diplomatic proposal; and (4) promote the creation of an international claims tribunal, where, upon Cuba's agreement to permit internationally certified claimants the right to repurchase expropriated property, investment restrictions will be lifted. The goal behind each possible amendment to the Helms-Burton Act is to see the complete lifting of investment restrictions at the earliest possible date. Each approach is discussed below along with identified questions that will have to be addressed for investment between the United States and Cuba to resume.

A. BARGAIN FOR CUBAN CONCESSIONS ON EMPLOYMENT STANDARDS AND JOB OPPORTUNITIES

From a humanitarian point of view, the United States is in a position to negotiate the reintroduction of investment in a way that will meet several of its policy objectives. Initially, the United States can requalify its investment policies upon terms that are intended to assist the average Cuban national be paid in hard currency, while working in a less regulated environment. Negotiating such a position will not be easy, and will

the private sector is beginning to occur in Cuba, although private property rights still have not been fully extended to Cuban nationals. This rise in the private sector has been acknowledged by the government as matter of concern. There is official recognition that a new class of dollar-rich entrepreneurs, operating at the margin of the state structures, has been created, and that this new class represents a threat to the Socialist establishment. Thus, it appears that Cuba's Socialist transition is slowly, and quite unwillingly, creating the conditions for real changes to occur, although the government is resisting the process as much as it can.

TRAVIESO-DIAZ PROSPECTIVE, *supra* note 22, at 4 (citations omitted).

require the Cuban government to assume a Perestroika-like approach to investment activities.¹⁰⁷

Under Law 77, foreign investors must contract for Cuban employees with a state employment agency.¹⁰⁸ Particularly with regard to joint ventures, the "Ministry of Labor and Social Security provides the labor regime."¹⁰⁹ Through this sub-contracting agreement, the Cuban worker never sees the true fruits of his or her labors:

Currently, foreign companies are required to pay the employing agency in convertible pesos, which works out to USD \$1 per peso, in addition to 25 percent of salary to pay for social costs. However, the employing entity pays the salaries of employees in non-convertible pesos which are worth approximately 20 pesos to USD \$1. As a result, a foreign employer may be paying USD \$500 per month for an employee, when that employee is receiving the equivalent of USD \$20 per month.¹¹⁰

The U.S. State Department has made statements opposing this practice and has called on foreign investors already in Cuba to "lobby the Cuban government to end the unfair practice of requiring foreign firms to pay hundreds of dollars per month for Cuban workers whom the State . . . pays only 5–10 percent of that amount in pesos."¹¹¹ By making the next step and letting it be known that investment dollars will be permitted to flow into Cuba in partial exchange for direct employment opportunities with hard dollar wages, the United States could assist the Cuban people and allow them access to hard currency.

Amending the Helms-Burton Act to permit the resumption of investment if Cuban employees can be hired directly and paid with hard currency, will potentially serve the goals of both Cuban and U.S. politicians.¹¹² The Cuban government will be able to claim

107. By insisting on hard currency wages and direct employment of Cuban workers involved in commercial activities funded by foreign investment, the United States policymakers will be able to analogize this situation with the cracking of the Berlin Wall as they appeal to their political bases. Arguably, if true economic incentives are available to growing numbers of Cuban nationals, the communist political ideology may be overrun by economic pragmatism in a relatively short period of time.

108. See Gallousis, *supra* note 19, at 95 (citing Law 77, Ch. 11 arts. 31 & 34).

109. Rivero, *supra* note 29, at 80 (citing Cuban Resolution 3/96 in response to Question 4.2 asking: "Must certain positions . . . be held by Cuban nationals?").

110. Alison Lacy & Alfred Avanessey, *INVESTING IN CUBA* 8 (July 2001) (unpublished manuscript on file with author) (citing *Cuba: A Guide for Canadian Businesses*, available at http://www.dfait-maeci.gc.ca/geo/html_documents/cuba-e.htm (last visited Oct. 4, 2001)).

111. John R. Hamilton, *Cuba: Economic Transition and U.S. Policy—Remarks on March 25, 1999*, available at <http://usinfo.state.gov/regional/ar/us-cuba/hamil25.htm> (last visited Oct. 4, 2001) (stating, "[C]hange in Cuba is inevitable. The current regime has flaws so profound that it is hard to imagine how it can endure. It is hard to predict when or how this change will occur. . . . We also believe that there is a sense in Cuba, and in the international community, that the beginning of the end of the regime is approaching.").

112. Admittedly, such an amendment conceivably will not be written in the space of a few paragraphs. Any amendment will have to qualify the terms upon which the investment will be permitted by addressing factors that include: the potential tax structures Cuba could implement to restrict Cuban citizens' access to hard currency, qualifications on employment that Cuban legislation might try to implement, and restrictions on the ability to spend hard currency in Cuba.

that it negotiated a huge concession from the United States, while at the same time opening a currently untapped source of investment funds. The U.S. government will be able to put hard currency directly in the hands of Cuban workers, promote the working of the invisible economic hand (and the subsequent move towards democratization), and permit its nationals to establish their business interests in Cuba before the eventual fall of the Castro regime.

This proposal does not address the lack of compensation to U.S. nationals who had assets expropriated, which initially served as the impetus for the investment prohibition. U.S. officials might be willing to move forward in permitting investment without addressing this situation, due to the unlikelihood that full compensation will be forthcoming; however, it might also be that policymakers can implement the amendment process in conjunction with permitting either the tiered investment approach, or an amended compensation schedule, as discussed in the following subsections.

B. PERMIT INVESTMENT IN A TIERED FASHION

It is becoming less and less likely that Cuba will ever pay adequate and effective compensation to those U.S. nationals who had property expropriated during 1959–1960. This does not mean, however, that claims of these individuals are worthless. Conceivably, the holders of these claims can be granted some rights that, although not equivalent to adequate compensation, provide some otherwise nonexistent relief.

A possible way of granting such rights is the creation of a one-year transition period during which persons, whether or not U.S. citizens,¹¹³ who had property expropriated would be given the exclusive right, via an exception to the Helms-Burton Act, to directly invest in Cuba. Under such a scenario, investment amounts should be determined by an arbitrary formula. Utilizing the damages provision of the Helms-Burton Act, this amount can be limited to three times the losses suffered, as certified by the Foreign Claims Settlement Commission.¹¹⁴ Following this one-year period of restricted investment, investment would be opened to everyone.

Creating a one-year investment window¹¹⁵ exclusively for the benefit of those who had property expropriated serves to allow them a first in advantage. The proposal represents a politically expedient way of addressing the compensation issue, while realistically acknowledging the unlikelihood of full compensation. Additionally, if the investment rights exemption is made freely salable and transferable, a potential income source is created that theoretically could provide some compensation.¹¹⁶

113. Effectively, due to the fact that most of the foreign-held expropriated assets were owned by U.S. nationals, most early-entrants under this proposal will be U.S. nationals. However, by not making this exclusion to the Helms-Burton Act only available to U.S. nationals, the United States may be able to avoid some of the negative international reaction that was received upon passage of the Helms-Burton Act, which has extraterritorial reach under its current form.

114. See 22 U.S.C. § 6082(a).

115. The one-year period set forth in this proposal was arbitrarily selected. While any eventual period of time utilized should be long enough to permit an advantage, it should not be so long as to chill investment by subsequent investors.

116. The potential exists for a market to develop in the buying of investment rights by those who want early entrance into Cuba from those who have the right to enter.

The proposal of a tiered investment process is placed on the discussion table with the understanding that political, economic, and legal issues will have to be overcome. On a political front, the tiered approach permits an increased flow of investment capital into Cuba with the hope that economic choices will eventually lead to a true self-determination by the Cuban people of their leadership. This reopening of the investment spout should only occur if assurances can be received that the economic benefit will flow directly to the Cuban people (and not be siphoned off directly by a government struggling to put its hands on hard currency). Thus, as discussed in the preceding subsection, the Helms-Burton Act should be used to serve as a bargaining chip in diplomatic negotiations to ensure certain economic rights for the Cuban people.¹¹⁷

On an economic front, will persons granted early investment rights in Cuba actually invest? Although a doctoral thesis could easily be written on this question, the answer comes down to the value that is created by being an early entrant into a developing market. As alluded to by Matias Travieso-Diaz in the introduction to his book, *The Laws and Legal System of a Free-Market Cuba—A Prospective for Business*, a business executive who is permitted to invest in Cuba, may delay investing, despite a desire to do so, until obstacles other than the embargo (such as the existence of a Socialist state and the uncertain investment protections available under the developing Cuban legal system) are removed.¹¹⁸ On the other hand, if privatizations should occur within the timeframe of the tiered investment period, then those persons with the right to invest in Cuba will have a clear advantage at being the first to bid. If privatization should occur after the tiered investment period ends, those persons with the strongest economic ties and operational base within Cuba, will arguably have an advantage gaining a share of the privatized company. This also may inspire those holding early-entrant rights to invest.

On a legal front, the United States can expect that arguments will be raised, both by U.S. nationals and foreign states, alleging that opening investment in a tiered manner is commercially discriminatory to those who did not suffer from expropriation. Nationally, Congress can address potential lawsuits from U.S. citizens not entitled to early entry to Cuban investment by demonstrating, through statutory findings, that compelling justifications are present to implement the one-year window of restricted investment. Internationally, the chilling effects of the Helms-Burton Act will have to be restricted (i.e., by amending Titles III and IV) to limit the arguments against extraterritorial overreaching.

C. NEGOTIATE A DISCOUNTED COMPENSATION SCHEDULE FOR THE OWNERS OF EXPROPRIATED PROPERTY

For a third proposal, the Helms-Burton Act also could be amended, based on the recent Cuban proposal for negotiations, to permit investment following the creation of a discounted schedule to compensate the owners of expropriated property. As previously discussed, in November of 2001, Cuba's Minister of Foreign Affairs announced to the United Nations that Cuba recognizes the compensation rights of those who had property expropriated by the Cuban government.¹¹⁹ Additionally, Cuba indicated that it is

117. See discussion *supra* Part VIIa.

118. See TRAVIESO-DIAZ PROSPECTIVE, *supra* note 22, at introduction.

119. See *Statement Delivered by H.E. Mr. Felipe Pérez Roque*, *supra* note 4.

now "willing to reach an agreement [on compensation] that also takes into account the extremely burdensome economic and human hardships inflicted on [Cuba] by the blockade."¹²⁰ By framing potential negotiations in this way, Cuba appears to desire reaching a settlement, of sorts, which credits Cuba with a monetary value for the hardship suffered during the embargo over the last four decades. This hardship credit would then be used by Cuba as a set-off to diminish actual monetary compensation paid to U.S. nationals.

The diplomatic rhetoric is not noteworthy in how it is proposed, but rather is important because it was proposed. Obviously, an U.S. politician would gain little by agreeing to the proposal as made. However, seizing upon the concession that U.S. interests are entitled to compensation, it is conceivable that a discounted compensation schedule can be reached (via the application of a compensation ratio)¹²¹ in order to place actual money in the hands of those who had property expropriated.

As has been discussed, the potential for adequate and effective individual compensation has diminished with time, so the negotiation of any substantial compensation, even if discounted, should be welcomed. Nay-Sayers will correctly raise the point that Cuba should not be rewarded with a discounted compensation schedule after illegally refusing to pay compensation for over forty years. As such, any ultimate compensation schedule should be aggressively negotiated to ensure that compensation is substantial, and takes into account that recompense has illegally been withheld for a substantial time. Even so, negotiators must not forget that U.S. interests are being harmed by the investment restrictions currently in place, and that a substantive compensation arrangement, even if not full compensation, is better than nothing.

Although this option can be attacked because it potentially rewards Cuban actions via a discounted compensation schedule, direct negotiations may prove the least burdensome method by which investors who had property expropriated can be compensated, while at the same time prove to be the quickest method for reopening investment opportunities in Cuba. As such, diplomatic efforts to seize upon the apparent invitation by Cuba to enter into negotiations appear to be worthwhile.

D. NEGOTIATE THE ESTABLISHMENT OF AN INTERNATIONAL CLAIMS TRIBUNAL WITH AN ACCOMPANYING RIGHT TO REPURCHASE PROPERTY

Should negotiations for an actual compensation ratio for expropriation claims prove unsuccessful, the Helms-Burton Act also could be amended to permit investment in Cuba after the establishment of an international claims tribunal, the jurisdiction of which is agreed to by Cuba. The establishment of a claims tribunal to establish the validity and amount of individual claims has historical precedence,¹²² and the independence of

120. *Id.*

121. As conceived, it appears the compensation ratio would be applied to an agreed property value. As discussed *supra* Part VII.D, an international claims tribunal could be utilized to determine property values, if the Cuban government is not satisfied with the values/losses certified by the Foreign Claims Settlement Commission. See discussion *supra* endnote 77.

122. For example, international claims tribunals have been established to address individual property claims giving rise to diplomatic tension between the following countries: Mexico and United States (Mexican expropriation of property—tribunal established 1923); Iran and United States (Iranian seizure of property—tribunal established 1981); Canada and United

the tribunal would serve to dissuade Cuba's concerns that U.S. evaluations of property claims are self-serving.¹²³

As envisioned by the author, the claims tribunal would, over a set period of time, certify the claims brought by persons who had property expropriated. Once the claim is certified, the claimant would be given the right to repurchase the expropriated property from the Cuban government at a predetermined percentage of the fair market value (as also certified by the claims tribunal).¹²⁴ If the claimed property is no longer held by the Cuban government, then Cuba may either substitute like property (approved by the tribunal), for which no claim has been made, or pay the claimant a cash award equivalent to the "spread" that would have existed between the purchase price and fair market value, had the claimant been able to purchase the property.

The determination of the percentage of fair market value that the claimant will have to pay for the right to reclaim property will ultimately be a matter of negotiation, but it should be established prior to the creation of the claims tribunal. The percentage should be low enough to give the purchaser an immediate form of compensation through the difference between the asset value and the price paid. The percentage, however, should not be so high as to send the Cuban economy into a downward spiral. A percentage of 65 percent of fair market value might be an appropriate starting place in the diplomatic negotiations. If handled properly, the potential exists for a flood of capital to be placed in the Cuban treasury through this privatization process.

This proposal has the benefit of avoiding the discriminatory application of investment opportunities associated with the second proposal, but it does require additional compliance by Cuba, which to this point has not been forthcoming. Cuba, under this proposal, will have to face the privatization of governmental property in a manner that

States (Claims relating to Gut Dam—tribunal established 1956); Venezuela and United States (Venezuelan seizure of property—arbitration panel established 1906). See Brian F. Havel, *The Constitution in an Era of Supranational Adjudication*, 78 N.C. L. REV. 257, 268 n. 32 (2000) (discussing Claims Commissions between the United States and Mexico, and the Iran-U.S. Claims Tribunal, and further recognizing these tribunals "were truly ad hoc in nature, forming a closed and predictable set of litigants, timeframes, and causes, so that the limits of jurisdiction *ratione personae*, *ratione temporae*, and *ratione materiae* were always fixed and ascertainable"); Jeff Nemerofsky, *Litvinov Lives? U.S. Investors May be Playing Russian Roulette*, 8 MICH. ST. U.—DET. C.L. J. INT'L L. 487, 495-96 (1999) (discussing International Arbitral Tribunal to Dispose of United States Claims Relating to Gut Dam between Canada and the United States, the Submission to Arbitration of All Unsettled Claims of Citizens of the United States of America Against the Republic of Venezuela, and the Iran-U.S. Claims Tribunal). See also Rosemary E. Libera, Note, *Divide, Conquer, and Pay: Civil Compensation for Wartime Damages*, 24 B.C. INT'L & COMP. L. REV. 291 (2001) (discussing the multilateral, but non-adversarial claims settlement functions of the United Nations Compensation Commission, created to compensate those suffering damages as a result of Iraq's actions during the Persian Gulf War).

123. To date, the validity of claims have been determined at Congressional direction by the Foreign Claims Settlement Commission. See discussion *supra* endnote 77.

124. This, of course, assumes the Cuban government is not willing to pay actual monetary compensation, or has failed to agree to a discounted compensation, schedule. See discussion *supra* Part VIIc.

contradicts the Socialist underpinnings of the government. As such, Cuba's government realistically might not accept this proposal until the current leadership is replaced.

The proposal should not be dismissed out of hand, however, since by amending the Helms-Burton Act with an eye toward multilateral involvement in the compensation effort, the current splintered approach taken by the nations of the world as to Cuba can be refocused into pressuring Cuba to comply with some sort of compensation scheme.

VIII. Conclusion

The investment relationship between Cuba and the United States is complicated and covers periods of extreme tension. Unfortunately, the forty-plus year investment prohibition has failed to bring compensation to those who had property expropriated, has failed to bring democratic reform to Cuba, and has failed to pressure Castro out of power.

Even though the investment restrictions initially implemented by the United States in response to massive property expropriations may have been justified forty years ago, the time has arrived for the United States to realize that the harm caused by investment restrictions to the United States and Cuba outweigh any benefits that might be gained. Cuba has now moved from the radical approach of foreign investment to a much more mainstream approach, further justifying the cessation of investment restrictions.

The United States should resume a policy aimed at permitting investment by its nationals in Cuba. Such investment should speed up the reforms that the embargo and investment prohibition have failed to bring about. Unfortunately, the existence of the Helms-Burton Act in its current form makes a pro-investment policy unworkable, thus the act should be amended. An amended version of the Helms Burton Act can be used to try and bring economic reform to the people of Cuba along, with some form of compensation or acknowledged legal rights to those who will likely never receive adequate or effective compensation for expropriated property, due to the passage of time.

This paper was written with the intent of promoting a discussion on the possibilities for reinstituting investment relations between the United States and Cuba, not to set forth a definitive plan. As the reader noticed, while reviewing the four proposals set out in Part VII, the issues to be approached are difficult, and possible solutions raise additional questions. Even so, Cuba is now indicating a willingness to enter into serious negotiations, and this opportunity should be seized so that foreign direct investment in Cuba may soon resume.
